No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, PETITIONER

v.

STANLEY S. NEUSTADT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

CITATIONS

Statutes—Continued

Miscellaneous—Continued

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on August 19, 1960.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (R. 57–60)[1] is unreported. The opinion of the court of appeals (App., *infra*, pp. 21–32) is reported at 281 F. 2d 596.

[1] Throughout this petition record references are to the appendix to the Government's brief in the court of appeals.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 33) was entered on August 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an appraisal of private property by an appraiser of the Federal Housing Administration, made for purposes of Government insurance of a private mortgage, gives rise to an actionable duty of care to one who becomes a purchaser of the property.

2. Whether a tort claim, based upon a statement reflecting an inaccurate FHA appraisal and communicated to the purchaser of property made subject to a Government insured mortgage, is excepted from the Federal Tort Claims Act as a "claim arising out of * * * misrepresentation."

STATUTES INVOLVED

1. Section 203 of the National Housing Act (Act of June 27, 1934, ch. 847, 48 Stat. 1248), as amended, 12 U.S.C. 1709 (1952 Ed., Supp. IV), provided in pertinent part as follows:[2]

> SECTION 203. (a) The Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make

[2] The present statute is the same except that the amounts and percentages in Section 203(b)(2), 12 U.S.C. 1709(b)(2) (1958 Ed., Supp. I), have been increased to permit the Commissioner to insure a greater proportion of the appraised value.

commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon * * *.

(b) To be eligible for insurance under this section a mortgage shall—

* * * * *

(2) Involve a principal obligation (including such initial service charges, appraisal, inspection, and other fees as the Commissioner shall approve) in an amount * * * not to exceed an amount equal to the sum of (i) 95 per centum * * * of $9,000 of the appraised value (as of the date the mortgage is accepted for insurance), and (ii) 75 per centum of such value in excess of $9,000 * * *.

* * * * *

2. Section 226 of the National Housing Act (Act of June 27, 1934, ch. 847), as added by the Housing Act of 1954 (Act of August 2, 1954, ch. 649, § 126, 68 Stat. 607), 12 U.S.C. 1715q, provides in pertinent part as follows:

SECTION 226. The Commissioner is hereby authorized and directed to require that, in connection with any property upon which there is located a dwelling designed principally for a single-family residence or a two-family residence and which is approved for mortgage insurance under section 203 * * * of this Act, the seller * * * shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. * * *

3. The Federal Tort Claims Act provides in pertinent part as follows:

> 28 U.S.C. 1346(b)—
>
> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> 28 U.S.C. 2680(h)—
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * * *
>
> (h) Any claim arising out of * * * misrepresentation * * *.

STATEMENT

1. By Section 203(a) of the National Housing Act, *supra*, pp. 2–3, the Federal Housing Commissioner is authorized to insure mortgages upon residential property in an amount depending upon the appraised value of the property.

An application for insurance may be made only by a financial institution approved as a mortgagee by the Commissioner.[2] Applications are commonly made in

[2] Section 203(a), 12 U.S.C. 1709(a); 11 F.R. 177A–890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(a) (1949 Ed.)

advance of execution of the mortgage[4] in order that a prospective seller may have his house approved for mortgage insurance although the buyer is unknown. This is accomplished by causing an approved lender to file with FHA an application for a "conditional commitment" (R. 48). On receipt of such an application, the FHA technical staff appraises the property (1) to determine whether it meets certain standards of eligibility and (2) to fix a valuation for insurance purposes.[5] If the property is found eligible, the Commissioner agrees (in a conditional commitment) to insure a mortgage in an amount computed on the basis of the appraised value of the property, on the condition that the mortgagor is found financially able to carry the mortgage.[6]

By Section 226 of the National Housing Act, *supra*, p. 3, the Commissioner is directed to require that the seller of a single-family residence approved for insurance under Section 203 "shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner." Accordingly, the Commissioner's regulations require an application for mortgage in-

[4] See 19 F.R. 5045, 24 C.F.R. 221.9 (1958 Supp.). All C.F.R. citations in this petition are to regulations in force at the time the transaction here in question occurred.

[5] 24 C.F.R. (1949 Ed.) 200.4(b); 24 C.F.R. (1958 Supp.) 221.38.

[6] R. 48; 11 F.R. 177A-890, as redesignated, 13 F.R. 6443, 8260, 24 C.F.R. 200.4(b)(2)(i) (1949 Ed.); 19 F.R. 5045, 24 C.F.R. 221.12 (1958 Supp.).

surance to be "accompanied by an agreement * * * executed by the seller" whereby he agrees that prior to any sale of the dwelling he "will deliver to the purchaser * * * a written statement * * * setting forth the amount of the appraised value of the property as determined by the Commissioner."[1]

Upon issuing a conditional commitment to a proposed mortgagee, the Commissioner also issues a separate document entitled "Statement of FHA Appraisal" (R. 54). This statement must be furnished the purchaser before he enters into the contract to purchase, or, if it is not made available to the seller by that time, the contract must contain language to the effect that the purchaser will not be obligated to complete the purchase unless the seller has furnished such a statement setting forth an appraised value of not less than a designated amount (R. 56–57).

2. In early 1957, the owners of a single-family house and lot located in Alexandria, Virginia, in anticipation of selling the property, caused an approved lender to apply to the Federal Housing Commissioner for a conditional commitment to insure a mortgage (R. 53–54). Pursuant to this application, an FHA appraiser inspected the premises some time prior to March 14, 1957 (R. 30). An underwriting report was made, and the property was found to be eligible for mortgage insurance (R. 30). The Commissioner thereupon issued to the applying lender a conditional commitment based on an appraised value of $22,750 (R. 30–31, 33, 53–54).

[1] 19 F.R. 5045, 24 C.F.R. 221.14 (1958 Supp.).

The respondents became interested in the house after inspecting it on March 14, 1957 (Tr. 30),[8] and on April 9, 1957, entered into a contract for the purchase of the property at a price of $24,000 (R. 29, 59). Agreement was reached after preliminary negotiations, during the course of which the respondents were advised that FHA had appraised the property for insurance purposes at $22,750 (R. 37). The contract was conditioned upon the respondents obtaining a loan, secured by an FHA-insured mortgage, in the amount of $18,800.[9] The contract also provided that the sellers would deliver to the respondents, prior to the sale of the property, a written statement setting forth the appraised value of the property as determined by the Federal Housing Commissioner (R. 29, 33).

On July 2, 1957, the settlement date, the respondents took title to the property and signed the written "Statement of FHA Appraisal" which they had been furnished (R. 38, 56–57). This document stated that the Commissioner "has appraised the property identified * * * and for mortgage insurance purposes has placed an FHA-appraised value of $22,750 on such property as of the date of this statement. (*The FHA appraised value does not establish sales price.*)" [Emphasis in original.] (R. 56).

[8] "Tr." refers to the transcript of proceedings in the district court

[9] This was the maximum amount insurable, as Section 203(b)(2), *supra*, p. 3, of the National Housing Act established a maximum insurable amount of $18,862.50 (95% of $9,000, plus 75% of $13,750) for an appraised value of $22,750, and the Commissioner by regulation required mortgages to be in multiples of $100. 19 F.R. 5045, 24 C.F.R. 221.17(a) (1958 Supp.).

The respondents moved into the house on July 10, 1957 (R. 39). Shortly thereafter, the walls and ceiling of the house developed substantial cracks (R. 39–40). Subsequent inspection disclosed that the foundation was settling in an unusual manner. By drilling through the basement floor, FHA officials learned that the subsoil was of a type of clay which, when exposed to water, quickly disintegrates. It was determined that the unusual settling was caused by accumulation of water in this subsoil, due to poor drainage conditions around the house.

3. On June 17, 1958, the respondents brought this action under the Federal Tort Claims Act in the United States District Court for the Eastern District of Virginia to recover the difference between the current market value of their house and the purchase price of $24,000 (R. 29–32). After a trial, the district court found that the respondents "in good faith relied upon the Commissioner's appraisal in consummating their contract of purchase," and that "reasonable care by a qualified appraiser would have warned them" of the serious structural defects which had been "preponderantly proved" (R. 59). The court held (R. 59) the Government liable in the amount of $8,000, the difference between the fair market value of the property at the time of settlement ($16,000) and the purchase price ($24,000).

The Court of Appeals for the Fourth Circuit affirmed. The court accepted the Government's contention that the exception to the Federal Tort Claims Act for "claim[s] arising out of * * * misrepresentation" in 28 U.S.C. 2680(h) (*supra*, p. 4) covers

negligent as well as willful misrepresentation (App., *infra*, p. 24). The court held, however, that under the National Housing Act the Government owed a specific duty of care to the respondents and that, although "there was an element of misrepresentation of fact in the government's conduct" which "might form the basis of an action for misrepresentation under general common-law principles" (App., *infra*, pp. 30–31), the misrepresentation exception in 28 U.S.C. 2680(h) did not bar liability.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that a duty of care is owed by the United States to every purchaser of a home appraised by the FHA and secured by an FHA-insured mortgage and has also held that this duty, springing from the National Housing Act, is actionable under the Federal Tort Claims Act despite the express exception in 28 U.S.C. 2680(h) applicable to tort "claim[s] arising out of * * * misrepresentation." We believe that this decision is in conflict with decisions of Courts of Appeals in four other circuits, and, both in its specific application to liability under the National Housing Act and its broader application to other situations where misrepresentations by federal officials are involved, the issue is of very great importance in fixing the tort liability of the United States.[10]

[10] The court below in its opinion does not refer to Virginia law but seems to have regarded federal law, in the form of the National Housing Act, as the sole source of any duty of care toward the buyer owed by the Federal Housing Commissioner. If, as the United States contended, a private appraiser would

1. The Second, Eighth, Ninth, and Tenth Circuits have all held that, in situations similar to that here involved, where because of alleged antecedent negligence the Government misstates certain facts causing a person who has relied on those facts to suffer loss, any claim which that person may have is one "arising out of * * * misrepresentation" and, therefore, not actionable by reason of 28 U.S.C. 2680(h).[11]

The Court of Appeals for the Fourth Circuit would distinguish this case from the decisions of other circuits on the ground that here the misrepresentation was preceded by a breach by FHA of a specific duty owed to the respondents. That duty, in the court's view, was to take care not to appraise property at an inflated value. The distinction is without substance. Even if there were such a duty (see, *infra*, pp. 14–17), the fact remains that, absent the misrepresentation of the property value, the respondents would have gone unharmed. Other courts of appeals, on the other hand, in construing the misrepresentation exception of the Torts Claims Act have deemed the

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have owed no similar duty under Virginia law, then the fact that the National Housing Act imposed a unique duty upon the United States could not properly serve to bring the case within the Federal Tort Claims Act, which imposes liability upon the United States only in circumstances where a private person would be liable. 28 U.S.C. 1346(b), 2676.

[11] *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States*, 241 F. 2d 781 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2); *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10).

controlling factor to be precisely whether the misrepresentation was essential to the complainant's injury.

Even if the distinction found by the court below were valid, a conflict with *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10), is not avoided. There the Tenth Circuit, on the assumed facts that a Government agent negligently tested the plaintiff's healthy cattle for brucellosis and caused the plaintiff's loss by misrepresenting to him that his cattle were diseased, held the plaintiff's claim to be one "arising out of * * * misrepresentation" and within the 28 U.S.C. 2680(h) exception. Implicit in the decision was the assumption by the court that there had been a breach of a duty of care antecedent to the representation itself. Although the Tenth Circuit did not say whether this duty was owed to the public at large or to the owner of the cattle, it is obvious that the primary interest in not having healthy cattle represented as diseased would be the interest of the owner of the cattle who relies upon the representation of the Government agent.

Likewise, the holding of the Eighth Circuit in *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967, cannot be distinguished on the rationale adopted by the court below. Although the Eighth Circuit in *National Mfg.*, as one ground for its decision, held that the Government owed no duty to anyone to take care to ascertain flood conditions correctly, the court's alternative discussion of the applicability of the misrepresentation exception to the Federal Tort Claims Act in 28 U.S.C. 2680(h) clearly was premised *arguendo* on an assump-

tion that a duty was owing. Yet such a duty could only run to the class of persons likely to be affected by the flood, a class which included the plaintiff in that action, just as at the time of the appraisal the respondents in this case could only have been in contemplation by the appraiser as members of a general class of potential mortgagors.[12]

2. The proposition that the respondents' claim is one for "negligent misrepresentation"—and therefore excluded from the Tort Claims Act—is supported not only by the decisions from four other circuits which have specifically invoked the misrepresentation exception in 28 U.S.C. 2680(h), but also under general common law principles.

Responsibility for the tort of negligent misrepresentation may rest upon negligence in the "manner of expression," failure to use "reasonable care in ascertaining the facts" or "absence of the skill and competence required by a particular business or profession." Prosser, *Law of Torts*, pp. 541–545 (2d Ed., 1955); see also, *Restatement, Torts*, Sec. 552; 1 Harper & James, *Law of Torts*, § 7.6 (1956); Bohlen,

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[12] By the same token, *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9), a case quite similar to *National Mfg.*, cannot be distinguished on the basis of the Fourth Circuit's "specific duty" analysis. It is important to stress that, where there is no duty owed by the Government, there is, of course, no need to be concerned with the "misrepresentation" exception. The absence of a duty would itself exonerate the United States from any liability. Indeed, it is only where a duty is assumed that the "misrepresentation" exception or other specific exclusions in the Act can come into play. Under the opinion below, however, the presence of such a duty would preclude resort to the "misrepresentation" defense.

Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733. In other words, negligent misrepresentation is not confined to cases where information is communicated in a negligent manner, but extends as well to cases where, as here, a representation of fact or professional opinion is based upon an antecedent, negligent investigation.

There is no reason for supposing that Congress, when it used the word "misrepresentation" in 28 U.S.C. 2680(h), meant other than the tort generally described by that name. On the contrary, the presumption must be that Congress intended the word to have the scope it carries in normal legal usage. See *Stepp* v. *United States*, 207 F. 2d 909, 911 (C.A. 4), certiorari denied, 347 U.S. 933; *Dupree* v. *United States*, 264 F. 2d 140, 143–144 (C.A. 3), certiorari denied, 361 U.S. 823; *United States* v. *Hambleton*, 185 F. 2d 564, 566–567 (C.A. 9).[13]

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[13] The court below relied in part upon this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 and on *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4). Appendix, *infra*, p. 27. Those cases differ significantly from the present one in that the government was directing private conduct so that the failure to give proper warning had a direct relationship to the damages suffered by the individuals who were, in practical effect, required to rely on the government for directions. Moreover, the exception for misrepresentations was not argued nor ruled upon by the courts involved, so that, so far as the issues here raised were present, they merely lurked in the record and the decisions cannot be considered precedents. *Webster* v. *Fall*, 266 U.S. 507, 511; see *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 87–88 (dissenting opinion).

3. For the reasons we have stated, the misrepresentation exception in 28 U.S.C. 2680(h), properly considered, is a bar to the respondents' suit even if an actionable duty is owed to a purchaser of FHA-appraised property. In point of fact, however, the Federal Housing Commissioner owes no actionable duty of care to a mortgagor. The statutory function of the FHA appraisal is to establish the maximum mortgage loan which FHA may insure on a particular piece of property. As pointed out in one of the legislative reports cited by the Fourth Circuit (App., *infra*, p. 29), "the FHA's appraisal system * * * [is] obviously essential to the proper underwriting of mortgage loan risks, and therefore operate[s] primarily for the protection of the Government and its insurance funds." H. Rept. 2271, 83d Cong., 2d Sess., p. 66.

It cannot be denied, however, that the appraisal incidentally affords certain benefits to the home buyer. As the FHA mortgage system is one of *mutual* insurance, each mortgagor has a tangible interest in the integrity of the FHA insurance fund. The appraisal, which ordinarily assures that each loan approved has the proper security behind it, is necessary to the preservation of this fund and thus protects those with a stake in it. And undoubtedly the FHA appraisal provides a measure of protection:

> * * * against the kind of mistakes in judgment which are likely to be made by a family not experienced in buying a home, or in home property values. * * * He will also have what probably only a small percentage of home buyers have ever had in the past: the benefit of

> knowing the appraised value set upon the property which he intends to buy or build, by a trained valuator acting in accordance with a procedure designed to reduce to a minimum, errors that might result from casual or hasty conclusions.[14]

Merely because the FHA appraisal provides such benefits to the home buyer, it does not follow that a negligent appraisal gives rise to an actionable claim. The committee reports, contrary to the court below (App., *infra*, p. 29), do not manifest a Congressional intent to impose upon the Government an actionable duty to the buyer. Although the Senate Report on the Housing Act of 1954 contains a section entitled "The Protection of the Consumer,"[15] that section merely expresses the direction of the committee that FHA should be more alive to the interests of the home owner than it had been in the past.[16] The

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[14] 1st Annual Report of the Federal Housing Administration, H. Doc. 88, 74th Cong., 1st Sess., at 17; see also, 90 Cong. Rec. A2985; 2d Annual Report of FHA, at 6; 4th Annual Report of FHA, at 15; 5th Annual Report of FHA, at 21; 6th Annual Report of FHA, at 9; 11th Annual Report of FHA, at 9; 12th Annual Report of FHA, at 8. And see also, Hearings before the Senate Committee on Banking and Currency on the National Housing Act, 73d Cong., 2d Sess., at 58, 127; Hearings before the House Committee on Banking and Currency on the National Housing Act, 73d Cong., 2d Sess., at 150; Hearings before the House Committee on Banking and Currency on Amendments to National Housing Act, 75th Cong., 2d Sess., at 84; Hearings before the House Committee on Banking and Currency on Amendment of the National Housing Act, 78th Cong., 1st Sess., at 8.

[15] S. Rept. 1472, 83d Cong., 2d Sess., 4–5.

[16] Cf. Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1806; 100 Cong. Rec. 12353.

Housing Act of 1954 was, of course, drafted at a time when certain abuses of the home improvement and rental-housing programs under the National Housing Act were being uncovered."[17] As the Senate committee report indicates, most of these abuses "were at the expense of the borrower."[18] It was a consequence of these disclosures that the committee emphasized the need for FHA to recognize its responsibility and afford increased protection to the borrower "under these programs," *i.e.*, the Title I programs,[19] which have nothing to do with mortgage insurance. Far from establishing a right to recover damages against the United States,[20] the Committee was concerned merely with protecting the borrower against "being

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[17] See S. Rept. 1472, 83d Cong., 2d Sess., 2; H. Rept. 2271, 83d Cong., 2d Sess., 63; 8th Annual Report, Housing and Home Finance Agency, 6–7, 92–93 (1954), 100 Cong. Rec. 12352; see generally, Hearings before the Senate Committee on Banking and Currency, 83d Cong., 2d Sess., on the Housing Act of 1954, pp. 1303–2029.

[18] S. Rept. 1472, 83d Cong., 2d Sess., 11.

[19] *Id.* at 11–12; see 100 Cong. Rec. 7610, 7611; Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., 1305.

[20] "Senator BENNETT. I think if we are going to eliminate the possibilities of fraud, we have to do something to make sure that the customer, the borrower, the actual man who signs the note, realizes the limitations of the FHA insurance and is put definitely on notice that the insurance runs to the lender and it is not a protection or a guaranty to him of the workmanship.

"We have been talking about title I, today, mostly. Doesn't the same situation exist in the buildings that are built under title II?

"Mr. COLE [Administrator, Housing and Home Finance Agency]. I think so.

* * * * *

taken advantage of by salesmen and dealers and bankers and others." [21] There was no purpose or design to impose a legal duty upon the Government.

The court below made reference to the conference report on the Housing Act of 1954, H. Rept. 2271, 83d Cong., 2d Sess. As that report expressly declares the conference committee's understanding that "technically there is no legal relationship between the FHA and the individual mortgagor," (*id.* at p. 66), it is difficult to see how this report is an aid in finding that in the matter of property appraisals there is a legal duty, actionable in tort, running from the FHA to the mortgagor.

"* * * I agree with the Senator that the home buyer should understand that the Federal Government is not guaranteeing his home.

"Senator BENNETT. That is correct. Let's go back to this inspection service for a minute—this, of course, is outside of title I, because there is no inspection and there is no appraisal in title I.

"The idea of the inspection service under title II is to protect the Federal Government, which undertakes to insure the loan. The fact that the inspection is made, provides collateral benefits to the property owner. There is no question about that. But in the last analysis the property owner cannot say to the Federal Government, 'Well, your inspector inspected my house, and now look what's happened; therefore, you are responsible; therefore, you must come down here and fix it up.'

"Isn't that a correct statement of the limitation?

"Mr. COLE. I think so." [Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1402–1403.]

[21] Hearings before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess., at 1441; see, also, *id.* at 1454, 1654, 1656, 1700.

4. The magnitude of the possible liability of the Government as a result of the decision in this case is apparent from the fact that, in 1959 alone, 495,172 mortgages in an aggregate amount of $6,069,418,000, were insured by the FHA [22] following disclosure to the mortgagor of the FHA-appraised value of the property in accordance with Section 226 of the National Housing Act, *supra*, p. 3. The significance of the decision, moreover, cannot be confined to the property appraisal field. On principle, it opens the doors to liability, as a matter of federal law, wherever information compiled or acquired by a Government agency is, in accordance with a Congressional directive, made available to a particular group of persons and is relied upon by an individual to his detriment. Cf., *Jones* v. *United States*, 207 F. 2d 563 (C.A. 2), certiorari denied, 347 U.S. 921; *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C.A. 8), certiorari denied, 347 U.S. 967; *Clark* v. *United States*, 218 F. 2d 446, 452 (C.A. 9); *Miller Harness Co.* v. *United States*, 241 F. 2d 781 (C.A. 2); *Anglo-American and Overseas Corp.* v. *United States*, 242 F. 2d 236 (C.A. 2); *Hall* v. *United States*, 274 F. 2d 69 (C.A. 10).

[22] Statistics are not maintained for the number of appraisals made in which insurance is not written, or for the excess of appraised value over the insured amount.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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NOVEMBER 1960.

APPENDIX

United States Court of Appeals for the Fourth Circuit

No. 8071

UNITED STATES OF AMERICA, APPELLANT
versus
STANLEY S. NEUSTADT AND ROSE-BARBARA Y. NEUSTADT, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA. ALBERT V. BRYAN, DISTRICT JUDGE

(Argued May 31, 1960. Decided August 19, 1960.)

Before SOPER and BOREMAN, Circuit Judges, and BARKSDALE, District Judge.

SOPER, Circuit Judge:

The question in this case is whether the purchaser of a single residence property covered by a mortgage under § 203(a) of the National Housing Act as amended, 12 U.S.C. § 1709(a), is entitled under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., to recover damages occasioned by the negligence of an agent of the Federal Housing Commissioner in mak-

ing an appraisal of the property under the provisions of the statute and the regulations issued pursuant thereto. See 12 U.S.C. § 1709(b)(2) and 24 C.F.R. § 200.4(b). The United States does not deny that the appraisal was faulty or that the purchasers were injured thereby but defends on the ground that the plaintiffs' claim arises out of misrepresentation which is excluded from the coverage of the Tort Claims Act by 28 U.S.C. § 2680(h).

The property is located in Alexandria, Virginia. The former owners, in anticipation of selling it, caused an approved lender to make application under 12 U.S.C. § 1709(a) of the Act for a conditional commitment to insure the mortgage and pursuant thereto the property was inspected by an FHA appraiser, who reported that the property was eligible for mortgage at the appraised value of $22,750. The plaintiffs as prospective purchasers were apprised of this fact. Thereupon a contract of sale was executed conditioned upon the purchasers obtaining a loan secured by an FHA mortgage in the sum of $18,800. Therein the sellers agreed to furnish the plaintiffs a written statement of the appraised value as so determined, and this was done upon the settlement date when the purchasers took title to the property.

The purchasers took possession of the house and several days later substantial cracks appeared in the interior walls and ceilings in all of the rooms, as well as in the cinder blocks in the basement walls. It was then found by FHA officials that cracks were appearing in the exterior walls, and that the one-story sun porch was separating from the east wall, and that the foundations were settling in an unusual manner. These conditions were found to have been caused by the character of the subsoil, which contained a type of clay that quickly disintegrates when

exposed to water; and it was ascertained that the underpinning of the foundations would require the expenditure of several thousand dollars.

The pending case was then brought and tried before the District Judge without a jury, who rendered a verdict in favor of the plaintiffs for $8000. The judge called attention to the amendment to the statute by the act of Congress of August 2, 1954, codified in 28 U.S.C. § 1715(q), whereby the seller of a dwelling approved for mortgage insurance under the statute is required to agree to deliver to the purchaser prior to the sale a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. The Judge held that the statute as amended imposes upon the United States the duty to appraise the property with ordinary care and diligence as a gauge of the fairness of the price to be paid by the purchaser and that neglect of this duty makes the United States liable to the purchaser. He was of the opinion that the appraisal involves not merely a representation on the part of the United States but the performance of a positive act by the government as a direct and immediate service to the purchasers. He found that in this case the plaintiffs, in good faith, relied upon the appraisal in consummating the purchase and, since serious structural defects in the house subsequently appeared which reasonable care by a qualified appraiser would have discovered, the negligence of the government to perform its statutory duty entitled the plaintiffs to recover the direct loss of $8000 resulting therefrom. Accordingly, a judgment for this amount was rendered against the United States.

The United States on this appeal relies upon the exclusionary section of the Tort Claims Act, which declares in 28 U.S.C. § 2680(h) that the provisions

of the statute shall not apply, inter alia, to any claim rising out of misrepresentation or deceit. It has been uniformly held that "misrepresentation" in this context, since it appears in the act in juxtaposition to "deceit", means negligent as well as wilful misrepresentation.[1] We are in accord with this view especially as it is reasonable to suppose that Congress intended to exempt the Government from liability for misinformation carelessly given by its agents to the public in the wide field of its manifold activities.[2] The Government therefore contends that it has no liability in the pending case, and in support of its position cites a number of cases in the federal courts, analyzed in footnote,[3] in which, under varying cir-

[1] Jones v. United States, 2 Cir., 207 F. 2d 563, cert. den., 347 U.S. 921; National Mfg. Co. v. United States, 8 Cir., 210 F. 2d 263, 275–276, cert. den., 347 U.S. 967; Clark v. United States, 9 Cir., 218 F. 2d 446, 452; Miller Harness Co. v. United States, 2 Cir., 241 F. 2d 781; Anglo-American & Overseas Corp. v. United States, 2 Cir., 242 F. 2d 236; Hall v. United States, 10 Cir., 274 F. 2d 69.

[2] In National Mfg. Co. v. United States, 8 Cir., 210 F. 2d 263, 276, the court said that the intent of the section is to except from the Act cases where mere "talk" or mere failure "to talk" on the part of a government employee is asserted as the proximate cause of damage sought to be recovered from the United States.

[3] In Anglo-American & Overseas Corp. v. United States, S.D. N.Y., 144 F. Supp. 635, affirmed 2 Cir., 242 F. 2d 236, a merchant purchased certain lots of imported tomato paste, relying upon the fact that it had been admitted into the United States after examination by agents of the United States pursuant to the Pure Food, Drug and Cosmetics Act. Later the merchant endeavored to sell the goods to the United States but they were rejected and condemned because they were found to be adulterated. It was held that the plaintiff could not recover because the duty imposed upon the United States under the statute was owed to the consumers and not to the dealer and, also, because the plaintiff's injury grew out of misrepresentation within the exception of the Tort Claims Act which was applicable, although the misrepresentation flowed from negligence in testing the goods.

cumstances, it has been exonerated from liability for damages caused by negligent misrepresentation of its agents. We can discern no clear line running through these cases which serves as a guide to the solution of the present controversy. In most of them liability could be based only upon misrepresentation by agents of the government since the actions complained of were carried on for the benefit of the public at large and not in the performance of a specific duty owed to the injured party, *Clark* v. *United States,* 9 Cir., 218 F. 2d 446; *Anglo-American & Overseas Corp.* v.

In Hall v. United States, 10 Cir., 274 F. 2d 69, the plaintiff, who was engaged in the cattle business in New Mexico, complained that he was injured when agents of the United States Department of Agriculture engaged in testing livestock for disease informed him that his cattle were diseased, causing him to sell them for less than their market value, whereas in fact there were no diseased cattle in the herd. It was held that the plaintiff could not recover because the loss was caused, not by the faulty testing of the herd, but by the misrepresentations of the government agents. Whether the duty to inspect was owed to the general public or to the plaintiff was not considered.

In Jones v. United States, 2 Cir., 207 F. 2d 563, cert. den. 347 U.S. 921, the plaintiffs sued for loss incurred when they sold their stock in an oil company for less than it was worth after they had asked the United States Geological Survey for information as to the ultimate recovery of oil to be expected from the company's lands and were told, as the result of a negligent estimate by an agent of the United States, that the expected recovery was far less than it turned out to be. It was held that the suit was based on misrepresentation, for which recovery was barred under the statute. Whether the government owed any duty to the plaintiffs was not discussed, but it was pointed out in the opinion of the District Judge, 120 F. Supp. 894, that the members of the geological survey are forbidden by the statute, 43 U.S.C. § 31, to execute surveys or examinations for private parties.

In Clark v. United States, 9 Cir., 218 F. 2d 446, it was held that the United States was not liable for damages to persons and property caused by flood in the Columbia River, since the evidence showed no negligence on the part of the United States either

United States, 2 Cir. 242 F. 2d 236; or the statute or contract governing the activity expressly exempted the government from liability for the acts of its agent, *Jones* v. *United States,* 2 Cir., 207 F. 2d 563, cert, den. 347 U.S. 921; *National Mfg. Co.* v. *United States,* 8 Cir., 210 F. 2d 263.

On the other hand, it has been held that if the government assumes a duty and negligently performs it, a party injured thereby may recover damages from

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in its precautions to prevent the flooding of lands or in the issuance of a bulletin to the public to the effect that the flood situation was not dangerous. The court added that even if the flood should have been foreseen and the bulletin was negligently issued, the government was not liable since the misrepresentation therein involved fell within the exception of the Tort Claims Act.

Again, in National Mfg. Co. v. United States, 8 Cir., 210 F. 2d 263, cert. den. 347 U.S. 967, the liability of the United States for dissemination by its agents of erroneous flood and weather reports was before the courts. It was held that the government was exonerated from liability for damages from flood waters by the express provision set out in the flood control act and that this provision was broad enough to bar recovery for damages caused by the negligence of government agents in circulating flood and weather reports; and it was also held that negligent conduct in the dissemination of erroneous reports was within the misrepresentation exception of the Tort Claims Act.

In Miller Harness Co. v. United States, 2 Cir., 241 F. 2d 781, the plaintiff purchased from the United States certain surplus property described as saddle parts in the invitation to bidders wherein bidders were cautioned to inspect the property, and it was expressly stated that the government made no guarantee as to quantity, kind, character or description. The plaintiff being uncertain as to the character of the saddle parts, telephoned the custodian of the government depot and was told that stirrup irons and stirrup leathers were included in the item. Accordingly, the plaintiff bought the goods; but when they were delivered no stirrup parts or stirrup leathers were included and accordingly he brought suit for their reasonable value. Judgment went against him on the ground that his claim was based merely on misrepresentation.

the United States even though the careless performance of the duty may have been accompanied by some misrepresentation of fact. Thus in *Otness* v. *United States,* D.C., Alaska, 178 F. Supp. 647, a shipowner sued to recover for the loss of his vessel due to collision with a submerged channel light which the Coast Guard undertook to locate but negligently failed to find, whereupon it issued an erroneous bulletin that no part of the light remained above the bottom of the sea. It was held that although the bulletin contained a misrepresentation of facts, this did not bring the case within the exemption of the Tort Claims Act or absolve the United States from liability for the negligent performance of a duty which it had voluntarily assumed. In like manner, the United States was held liable under the Federal Tort Claims Act for the negligent operation of a lighthouse in *Indian Towing Co.* v. *United States,* 350 U.S. 61, and for the negligent marking of a wreck in *Somerset Seafood Co.* v. *United States,* 4 Cir., 193 F. 2d 631. In each case liability was based upon the negligent performance of a duty assumed by or resting upon the government. There was no discussion in either case of the statutory exemption of the United States for liability for misrepresentation but, as pointed out by the District Judge in the court below, misrepresentation was necessarily involved in the negligent marking of the wreck in one case and in the absence of notice of peril to the mariner in the other.

The record in the instant case discloses that the government owed a specific duty to the plaintiffs as purchasers of the property and that they suffered substantial loss from the careless manner in which the duty was performed. The scheme of the National Housing Act, 12 U.S.C. § 1709(a), under which the purchase was made endows the Federal Housing Commissioner with power to insure a mortgage on a

single family residence property if the mortgage complies with certain statutory requirements and involves a principal obligation not in excess of specified fractions of the appraised value of the property, which are placed very high in order to aid a prospective buyer with limited capital to acquire a residence. Application for the insurance must be made by an approved financial institution and frequently is made in advance of the execution of the mortgage. On receipt of the application an appraisal of the property is made to determine whether it meets the standards prescribed by the Commissioner and to fix a valuation for insurance purposes. If the property is approved, a conditional commitment is made to the applicant wherein the Commissioner agrees to insure the property in an amount computed upon its appraised value provided it is found that the purchaser is financially able to carry the mortgage. Obviously the appraisal of the property is an important part of the process. To accomplish this the appraiser inspects the property to ascertain its condition and eligibility and, if it is found eligible, makes an appraisal based on its long-time economic value.

This procedure was designed to effectuate the purpose of the Act, to encourage the construction of housing by giving aid to prospective purchasers, and at the same time to protect the government from a loss that would be incurred by insuring undesirable property. In 1954, the purpose of Congress to protect the purchaser was emphasized and further advanced by the addition to the statute of the amendment set out in 28 U.S.C. § 1715(q) referred to above. This Act directed the Commissioner to require the seller of residential property, covered by an approved mortgage under the statute, to deliver to the purchaser a written statement setting forth the amount of the

appraised value as determined by the Housing Commissioner. The purpose of the new act to inform the purchaser of the value placed upon the property by government appraisal for his own guidance is clear upon the face of the enactment. If there were any doubt about it, it is made clear by the legislative history.

The Senate report upon the National Housing Act of 1954 contains a section entitled "The Protection of the Consumer" in which it was indicated that there was need for a change in the philosophy of the Federal Housing Administration in the administration of the statute, so that the agency, while keeping in mind the objectives of the Act to maintain a high limit of housing production and to protect the insurance fund and the mortgagee from loss, would recognize its responsibility to protect the public interest in general and the rights of homeowners in particular, and at all times to regard it as a primary responsibility to act in the interest of the individual home purchaser and protect him to the extent feasible. See 2 U.S. Code Congressional and Administrative News, p. 2726. The conference report on the measure emphasizes the same purpose. It pointed out that, notwithstanding the fact that there is no technical relationship between the FHA and the individual, it was the intent of Congress that the procedures of the administration should not be used exclusively for the protection of the government and its fund, and attention was drawn to the specific provision of the amended act which requires that the purchaser be given a written statement setting forth the FHA's appraised value of the property so that the purchaser may be informed as to the amount that would be warranted in making the purchase. 2 U.S. Code Congressional and Administrative News, p. 2828.

Thus, it is abundantly clear that the government owed a specific duty to the plaintiffs in this case even though there was no contractual relationship between them. The situation is similar to that considered by Judge Cardozo in *Glanzer* v. *Sheppard*, 233 N.Y. 236, where it was held that a public weigher, who was employed by the seller of goods and overstated the weight of the merchandise, was liable in damages to the buyer who bought them on the faith of the weigher's certificate. It was pointed out in the opinion that the defendant was not held merely for careless words but for the careless performance of the act of weighing.

So in the pending case, the wrongful conduct complained of does not consist merely or chiefly in the communication to the plaintiffs whereby they were notified that the Housing Commissioner had appraised the property for mortgage purposes at $22,750, but primarily in the negligent appraisal itself whereby they were led to pay more for the property than it was worth. The government takes the narrow ground that the purchasers' loss was not occasioned by the negligent appraisal but by the misrepresentation in the government's report of the appraisal. The communication itself however was not, strictly speaking, a misrepresentation of fact, for it correctly reported that the Commissioner had appraised the property and placed a valuation upon it of $22,750, both of which statements were true. It cannot be denied, however, that there was an element of misrepresentation of fact in the government's conduct when the transaction is considered as a whole. The report sent to the purchasers purported to be and might fairly be accepted by them as an accurate appraisal of the value of the property carefully made so that in effect it amounted to a misstatement of fact. Hence

it might form the basis of an action for misrepresentation under general common-law principles, for it is generally held that one who supplies information for the guidance of others in their business is liable for harm to those who rely upon the information if there has been negligence in obtaining and communicating it, and the person harmed is one for whose guidance the information was supplied. Restatement of Torts, § 552; Prosser on Torts, p. 543.

It does not necessarily follow, however, that the case falls within the exemption of the Tort Claims Act, since it involves not only misrepresentation but also negligent performance of a definite duty owed to the plaintiffs. The real question is whether it was the intent of Congress to absolve the government from liability in every case in which misrepresentation plays merely a part. Misrepresentation, as Prosser shows, runs all through the law of torts and there are many types of wrongful conduct in which there are elements of misrepresentation that are usually grouped under categories of their own. Thus, as the author says (p. 520):

> * * * A great many of the common and familiar forms of negligent conduct, resulting in invasions of tangible interests of person or property, are in their essence nothing more than misrepresentation, from a misleading signal by a driver of an automobile about to make a turn, or an assurance that a danger does not exist, to false statements or non-disclosure of a latent defect by one who is under a duty to give warning. In addition, misrepresentation may play an important part in the invasion of intangible interests, in such torts as defamation, malicious prosecution, or interference with contractual relations. In all such cases the particular form which the defendant's

> conduct has taken has become relatively unimportant, and misrepresentation has been merged to such an extent with other kinds of misconduct that neither the courts nor legal writers have found any occasion to regard it as a separate basis of liability.

In view of this situation we do not think that the government is necessarily absolved from liability in every case of wrongful conduct on its part which incidentally embraces misrepresentation. It is abhorrent to common sense to hold that the government can relieve itself from liability for neglect of duty owed to an individual merely by telling him falsely that the duty has been faithfully performed; and it cannot be supposed that Congress had any such idea in mind when it included "misrepresentation" among the exceptions to the statute. Quite clearly the gist of the offense in this case was the careless making of an excessive appraisal so that the home seeker, whom the Commissioner was obligated to protect, was deceived and suffered substantial loss. This was the gravamen of the offense to which the report of the Commissioner was merely incidental. Accordingly, the judgment of the District Court is affirmed.

Affirmed.

JUDGMENT

United States Court of Appeals for the Fourth Circuit

No. 8071.

UNITED STATES OF AMERICA, APPELLANT

vs.

STANLEY S. NEUSTADT AND ROSE-BARBARA Y. NEUSTADT, APPELLEES.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

MORRIS A. SOPER,
United States Circuit Judge,

HERBERT S. BOREMAN,
United States Circuit Judge,

A. D. BARKSDALE,
United States District Judge.

AUGUST 19, 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960